

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs December 17, 2008

KIMBERLY ANN LYTTLE v. STATE OF TENNESSEE

Appeal from the Circuit Court for Marshall County
No. 2007-CR-152 Robert Crigler, Judge

No. M2008-00765-CCA-R3-PC - Filed June 10, 2009

The petitioner, Kimberly Ann Lyttle, appeals as of right the Marshall County Circuit Court's denial of her petition for post-conviction relief challenging her guilty plea convictions for possession with intent to sell cocaine and three counts of sale of cocaine and her resulting fourteen-year effective sentence. She argues that her trial counsel's ineffective assistance rendered her guilty pleas involuntary. The State argues that the trial court properly denied post-conviction relief. Following our review, we affirm the denial of post-conviction relief.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court is Affirmed.

D. KELLY THOMAS, JR., J., delivered the opinion of the court, in which JERRY L. SMITH and ALAN E. GLENN, JJ., joined.

Hershell D. Koger, Pulaski, Tennessee, attorney for appellant, Kimberly Ann Lyttle.

Robert E. Cooper, Jr., Attorney General and Reporter; Lacy Wilber, Assistant Attorney General; Charles Frank Crawford, District Attorney General; and Weakley E. Barnard, Assistant District Attorney General, attorneys for appellee, State of Tennessee.

OPINION

The record reflects that the petitioner was charged with eight counts of cocaine offenses, all Class B felonies, involving controlled buys with the same confidential informant occurring on four separate occasions: November 15, 2004; November 19, 2004; December 1, 2004; and December 11, 2004. On November 8, 2006, the petitioner pled guilty as charged to three of the counts of sale of cocaine, Class B felonies, and to a reduced charge of one count of possession of cocaine with the intent to sell, a Class C felony; the remaining four counts charging delivery of cocaine were dismissed. Also pursuant to the plea agreement, the petitioner received concurrent sentences of eight years for the Class B felonies to be served consecutively to a six-year-sentence for the Class C felony, for a total effective sentence of fourteen years.

On November 8, 2007, the petitioner filed a petition for post-conviction relief alleging that trial counsel was ineffective. She specifically argued that trial counsel was deficient for failing to file a motion to suppress the evidence recovered from a search of her residence, for failing to seek a severance of offenses, and for failing to advise her properly regarding her guilty plea. The petitioner contended that the ineffective assistance of counsel rendered her guilty pleas involuntary.

At the April 4, 2008 evidentiary hearing, the petitioner testified that trial counsel told her that her case was “just like Perry March” – that it was doomed. She recalled that she and trial counsel argued often – even “cussed” one another. She stated that they never discussed a motion to suppress or motion to sever. She said that trial counsel told her that she was facing between thirty and forty-five years at trial if convicted. She recalled that the State made an initial plea offer of twenty years followed by one for sixteen years, both of which she rejected. She talked to trial counsel mostly about her plea options and told him that she was willing to take twelve or fourteen years. She testified that she accepted the plea agreement because she “was just ready to get it over with.” She acknowledged that she did not ask trial counsel to file a motion to withdraw her guilty plea until December 27, 2006 – more than thirty days after the entry of judgments in her case. Trial counsel filed a motion to withdraw the guilty pleas on December 29, 2006, that was denied in January 2007. Trial counsel testified briefly that he did not file a motion to suppress or a motion for severance on the petitioner’s behalf. He did recall filing pretrial motions regarding the admissibility of the petitioner’s prior convictions as well as a motion for bond reduction.

On April 16, 2008, the post-conviction court entered written findings regarding the petition for post-conviction relief. The court found that trial counsel’s performance “was in no way deficient.” The court found that trial counsel adequately investigated and advised the petitioner regarding her case and the guilty plea. The court also found that the plea was voluntary, knowing, and intelligent. The court also incorporated its findings made at the evidentiary hearing which included that:

the [petitioner] clearly failed to prove ineffective assistance of counsel. [Trial counsel] did a thorough job. Personality conflict or not, he did a good job on it. He got the deal she wanted basically and she certainly failed to prove that her plea was not voluntary.

Based upon these findings, the court denied the petition for post-conviction relief.

ANALYSIS

The burden in a post-conviction proceeding is on the petitioner to prove his or her factual allegations by clear and convincing evidence. Tenn. Code Ann. § 40-30-110(f). On appeal, we are bound by the trial court’s findings of fact unless we conclude that the evidence in the record preponderates against those findings. Fields v. State, 40 S.W.3d 450, 456 (Tenn. 2001). Because they relate to mixed questions of law and fact, we review the trial court’s conclusions as to whether

counsel's performance was deficient and whether that deficiency was prejudicial under a de novo standard with no presumption of correctness. Id. at 457.

Under the Sixth Amendment to the United States Constitution, when a claim of ineffective assistance of counsel is made, the burden is on the petitioner to show (1) that counsel's performance was deficient and (2) that the deficiency was prejudicial. Strickland v. Washington, 466 U.S. 668, 687 (1984); see Lockhart v. Fretwell, 506 U.S. 364, 368-372 (1993). In other words, a showing that counsel's performance falls below a reasonable standard is not enough; rather, the petitioner must also show that but for the substandard performance, "the result of the proceeding would have been different." Strickland, 466 U.S. at 694. The Strickland standard has been applied to the right to counsel under Article I, Section 9 of the Tennessee Constitution. State v. Melson, 772 S.W.2d 417, 419 n.2 (Tenn. 1989).

Relative to her allegation that trial counsel was ineffective in failing to file a motion to suppress evidence, the petitioner failed to present any proof at the post-conviction evidentiary hearing regarding the veracity and reliability of the confidential informant that would establish a basis to properly suppress the evidence. Absent some proof that the motion to suppress would succeed, we cannot conclude that counsel's performance was deficient in this regard. See Black v. State, 794 S.W.2d 752, 757 (Tenn. Crim. App. 1990). Furthermore, we conclude that the affidavit provided as the basis of the search warrant more than adequately set forth the veracity and reliability of the confidential informant to satisfy Constitutional requirements. See State v. Jacumin, 778 S.W.2d 430, 435 (Tenn. 1989) (for a search warrant to meet constitutional requirements under Article I, Section 7, of the Tennessee Constitution, the warrant must comply with the two-prong standard voiced in Aguilar v. Texas, 378 U.S. 108 (1964) and Spinelli v. United States, 393 U.S. 410 (1969) – usually referred to as the "basis of knowledge" and "veracity" prongs); see also State v. Ballard, 836 S.W.2d 560 (Tenn. 1992).

Relative to her allegation that trial counsel was deficient for failing to file a motion to sever offenses, there was insufficient proof presented at the evidentiary hearing to show that a motion to sever should have been granted. The petitioner failed to prove this allegation of ineffective assistance by clear and convincing evidence.

Relative to the advice regarding her guilty plea, motion to withdraw her guilty plea, and the voluntariness of the plea, the petitioner's testimony and the record reflect that the petitioner did not inform trial counsel of her desire to withdraw her guilty plea until more than thirty days after the entry of the pleas, that trial counsel nevertheless filed a motion, but that the motion was denied on jurisdiction grounds by the trial court. Furthermore, the petitioner testified that she told trial counsel that she was willing to accept a plea offer of twelve to fourteen years; trial counsel was ultimately able to reach such an agreement with the State after at least two previous offers. The transcript of the guilty plea hearing further reflects that the petitioner understood the consequences of the plea.

We conclude that the petitioner has failed to meet her burden of proof regarding counsel's performance or the voluntariness of her guilty plea.

Having failed to meet the burden of proof regarding any of the allegations of her petition, we conclude that the evidence does not preponderate against the findings of the post-conviction court regarding the allegations surrounding counsel's performance and voluntariness of her guilty pleas. The record supports the trial court's denial of the petition for post-conviction relief.

CONCLUSION

In consideration of the foregoing, the judgment of the post-conviction court denying the petition for post-conviction relief is affirmed.

D. KELLY THOMAS, JR., JUDGE